### EXHIBIT 3

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#### SUPERIOR COURT OF RICHMOND COUNTY STATE OF GEORGIA

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MATTISON R. VERDERY, C.P.A, P.C., individually and on behalf of all persons and entities similarly situated,

Plaintiffs,

STAPLES, INC. and QUICK LINK INFORMATION SERVICES, LLC,

Defendants.

Civil Action File No. 2003-RCCV-728

### PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

This is a junk fax case brought against Staples, Inc. "(Staples") and Quick Link Information Services, LLC ("Quick Link"). The plaintiff is a small business that has purchased office products from, and is a customer of, Staples. As a customer, the plaintiff provided Staples with its facsimile telephone number. However, the plaintiff never requested nor gave Staples express permission to send fax advertisements to it. In March, 2003, plaintiff received an unsolicited fax advertising Staples' products (the "Fax") sent by Quick Link. Plaintiff's Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages ("Amended Complaint"), ¶ 16.

The plaintiff seeks certification of a class of approximately 160,000 to 180,000 customers of Staples who received the Fax and other unsolicited faxes from Staples or Quick Link advertising Staples' products ("Staples Faxes"). The plaintiff contends that each transmission of Staples Faxes

<sup>&</sup>lt;sup>1</sup> A copy of the Fax is attached as Exhibit "B" to the Class Action Complaint for Damages and Injunctive Relief ("Complaint") filed by Plaintiff in this action.

to class members violates the Telephone Consumer Protection Act of 1991 (the "TCPA"). Under the TCPA, the defendants are liable in the amount of \$500 for each Staples Fax sent to class members. In addition, if the defendants knowingly or willfully sent the Staples Faxes, damages may be trebled to \$1,500 for each fax sent.

#### I. FACTUAL BACKGROUND.

On about March 18,2003, the plaintiff received an unsolicited fax advertising the commercial availability of Staples' products (the "Fax").<sup>2</sup> Plaintiff's Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages ("Amended Complaint"), ¶ 16. The fax was transmitted by defendant Quick Link on behalf of Staples. Id.; Defendant Quick Link Information Services, LLC's Response to Plaintiff's First Interrogatories ("QL Interrogatory Responses"), ¶ 1. In addition to the plaintiff, the Fax was transmitted to between approximately 160,000 to 180,000 other class members, all of whom are customers of Staples. Amended Complaint, ¶ 17; QL Interrogatory Responses, ¶ 2; Affidavit of Jay D. Brownstein in Support of Motion for Class Certification ("Affidavit of Counsel"), ¶ 9(a), Exs. A and B.

The Fax was transmitted to each class member in the same fashion. Staples provided Quick Link with a database identifying intended recipients of the Fax. QL Interrogatory Responses, ¶¶ 1-3. Staples also provided Quick Link with the advertising content of the Fax. Id., ¶¶ 4, 10. Using its own technology and equipment, Quick Link "broadcasted" or transmitted the Fax to each member of the class. Amended Complaint, ¶ 17; QL Interrogatory Responses, ¶¶ 1-4, 61, 22; Defendant Quick Link Information Services, LLC's Responses to Plaintiff's First Request for Production ("QL

<sup>&</sup>lt;sup>2</sup> A copy of the Fax is attached as Exhibit "B" to the Class Action Complaint for Damages and Injunctive Relief ("Complaint") filed by plaintiff in this action.

Document Responses"), QL 003-006, 00010-0014. In addition to the Fax, the plaintiff is informed that the defendants sent other Staples Faxes to plaintiff and class members both before and after transmission of the Fax. See Affidavit of Counsel, ¶ 9(e); QL 0010; Verdery deposition, pp. 21-22...

Prior to receiving the Fax, the plaintiff had purchased office products and supplies from Staples. Deposition of Matt Verdery dated September 29, 2003 ("Verdery deposition"), pp. 6-8, 17; QL Interrogatory Responses, ¶8; Responses of Defendant Staples to Plaintiff's First Interrogatories ("Staples Interrogatory Responses"), ¶¶7, 11. In addition, prior to receiving the Fax the plaintiff applied for Staples' "Business Rewards" program. Verdery deposition, pp. 8-9. In connection with either making purchases of Staples products or the "Business Rewards" application, the plaintiff provided Staples with its fax telephone number. Verdery deposition, pp. 12-13, 15; Affidavit of Mattison R. Verdery dated November 6, 2003 ("Verdery Affidavit"), ¶ 6; QL Interrogatory Responses, ¶8. However, at no time did plaintiff give Staples express permission or invitation to receive fax advertisements concerning Staples' products. Verdery Affidavit, ¶7.

On information and belief, each member of the class is a customer of Staples who provided Staples with a fax telephone number prior to receiving the Fax and any other Staples Faxes. Affidavit of Counsel, ¶9(a), (b); QL Interrogatory Responses, ¶¶ 3-8.

#### II. ARGUMENT AND CITATION OF AUTHORITY.

This action is brought as a class action pursuant to Rule 23 of the Georgia Civil Practice Act (the "GCPA"). Effective July 1, 2003, Rule 23 of the GCPA was modified to conform to Fed. R. Civ. P. Rule 23. Since the enactment of the Georgia statute in 1966, Georgia courts have read it as though it tracked the modern federal rule. See Sta-Power Industries, Inc. v. Avant, 134 Ga. App. 952 (1975); Stevens v. Thomas, 257 Ga. 645 (1987). Thus, Georgia cases decided under the previous

statute should remain binding precedent under the new rule, which now virtually mirrors F.R.C.P. Rule 23, and Georgia courts will continue to look to federal class action cases for guidance on the appropriateness of class certification. <u>Sta-Power Industries, Inc. v. Avant, supra.</u>

Under Georgia's amended Rule 23, Georgia courts, just like their federal counterparts, must initially determine (a) whether a proposed class is sufficiently numerous to justify class certification; (b) whether common issues of law and fact exist among all class members; (c) whether the claims of class representatives are typical of the claims of the class; and (d) whether class representatives and class counsel are adequate to represent the interests of the class. O.C.G.A. § 9-11-23(a); Stevens v. Thomas, supra., 648-650. Once the foregoing prerequisites have been satisfied, the court must then determine whether the case should be certified under one or more of Rule 23(b)(1) (risk of inconsistent or varying adjudications establishing incompatible standards of conduct for defendant or substantially impairing or impeding non-present class members' interests); Rule 23(b)(2) (injunctive or declaratory relief with respect to class as a whole); or Rule 23(b)(3) (common questions predominate and class action is superior to other methods of adjudicating controversy). In this case, certification is proper under each of Rule 23(b)'s subparagraphs.

#### A. <u>Numerosity</u>.

O.C.G.A. § 9-11-23(a)(1) requires that members of a proposed class be "so numerous as to make it impractical to bring them all before the court." Georgia courts have held that classes with as few as twenty-five members are appropriate for certification. Stevens v. Thomas, supra.; Sta-Power Industries, Inc. v. Avant, supra. Numbers in excess of forty (40), particularly those exceeding one hundred (100) or one thousand (1,000) have been found sufficiently numerous. Moore's Fed. P., ¶ 23.05 [1], p. 23-139. The Georgia Supreme Court has noted with approval that a class

numbering over one hundred (100) members was sufficiently numerous. Stevens v. Thomas, supra., at 649. It is not necessary that the exact size of the class be known to satisfy the numerosity requirement. See In re Three Mile Island Litigation, 95 F.R.D. 164 (D. Pa. 1982) ("The class may be certified, even though its exact size is unknown, if common sense or common knowledge indicates that it is large"); C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1762.

There is no question that numerosity is satisfied in this case. The Fax was transmitted to approximately 160,000 to 180,000 customers of Staples. In addition, other Staples Faxes are believed to have been sent to class members before and after the Fax. The class proposed by plaintiff is sufficiently numerous to meet the requirements of O.C.G.A. § 9-11-23(a)(1).

#### B. <u>Commonality</u>.

To obtain class certification, the class representatives must establish that there are questions of law and fact common to the class and (for certification under 23(b)(3)) that those questions predominate over individual questions. O.C.G.A. §§ 9-11-23(a)(2) and 9-11-23(b)(3); Hill v. General Finance Corp., 144 Ga. App. 434 (1977). "There need not be a total absence of individual questions of law or fact as long as the common questions predominate." Trend Star Continental v. Branham, 220 Ga. App. 781, 782 (1996) (certifying a class action regarding the sale of unregistered securities).

This is a case for declaratory and injunctive relief and damages under a federal statute that specifically grants a private right of action for violations. See 47 U.S.C. § 227(b)(3). The defendants' conduct in sending unsolicited fax advertisements to class members is common to all class members. The defenses raised by the defendants to plaintiff's claims are also common among the class. Specifically, the defendants contend that the plaintiff (and impliedly each class member) gave Staples express permission to send fax advertisements by virtue of (a) giving Staples its fax

telephone number and (b) having a business relationship with Staples. QL Interrogatory Responses, ¶7; Staples Interrogatory Responses, ¶¶5,7,8, 11.3 The so-called "established business relationship" defense will be relied upon with by the defendants with respect to all class members, who, like the plaintiff, are also Staples customers. Likewise, the declaratory and injunctive relief sought against the defendants will be common among the class, and damages sought by class members are fixed and identical under the TCPA (\$500 for each unsolicited fax, which may be trebled to \$1,500).

Because each class member's claims against the defendants arise under the same statute, issues of liability and damages will necessarily be common to all class members. See Hooters of Augusta, Inc. v. Nicholson, 245 Ga. App. 363 (2000) (affirming certification of private junk fax class action filed under TCPA). Thus, the commonality requirements of O.C.G.A. § 9-11-23(a)(2) and (b)(3) are met.

#### C. Typicality.

O.C.G.A. § 9-11-23(a)(3) requires that the claims of the named plaintiff be representative of the claims of the class. Typicality is established upon a showing that a defendant "committed the same unlawful acts in the same method against an entire class." Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983).

The plaintiff is a customer of Staples who provided Staples with it fax number, but did not give Staples express permission to send fax advertisements to it. Plaintiff's claims are identical to other members of the class, who are also customers of Staples who provided Staples with fax

Under the TCPA, the defendants have the burden of proving that express permission was provided prior to the transmission of the Fax or other Staples faxes. 47 U.S.C. § 227(a)(4) (liability attaches for the fax transmission of "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.") (Emphasis added).

numbers but not express permission to send fax advertisements.<sup>4</sup> The defendants transmitted the Fax and other Staples Faxes to class members in the same manner. The plaintiff contends that each individual transmission by the defendants constitutes a violation of the TCPA, giving rise to claims for declaratory and injunctive relief and statutory damages. Thus, the claims of plaintiff are typical of the claims of class members.

#### D. Adequacy of Representation.

Adequacy of representation involves an analysis of the adequacy of class counsel and the adequacy of the class representative. O.C.G.A. § 9-11-23(a)(4). "The important aspects of adequate representation are whether plaintiffs' counsel are experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." Stevens v. Thomas, supra., at 640. For class representatives, the goal is to determine whether any conflict exists between the representative(s) and other class members. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985). To justify denial of class certification, class conflicts must constitute an "opposing interest...relat[ing] to the subject matter of the action or relief sought." Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977).

Class counsel are attorneys with experience in class actions and complex litigation, and will adequately represent the class. There are no apparent conflicts between class members and class counsel in this case.<sup>5</sup> In addition, the named plaintiff is an adequate class representative and there

<sup>&</sup>lt;sup>4</sup> Any recipients of the Fax or other Staples Faxes who <u>did</u> provide express permission to receive fax advertisements from Staples are excluded from the class. Amended Complaint, ¶ 21.

<sup>&</sup>lt;sup>5</sup> This is not a limited fund case, where class members are seeking recovery of the same funds or assets. Nor is it a case where class members' interests in the outcome may be divergent. Remedies for the defendants' violations of the TCPA are fixed by statute. Therefore, each class member is entitled to the exact same relief as every other class member—no more and no less.

are no apparent conflicting interests between the plaintiff and members of the proposed class. The plaintiff seeks to represent other individuals or entities that received unsolicited faxes sent by the defendants advertising Staples' products. Like other class members it seeks to represent, the plaintiff is a customer of Staples who provided Staples with a telephone fax number in the course of doing business with Staples. Like other class members, the plaintiff did not give express prior permission to Staples to send the Fax or other Staples Faxes. If the defendants are liable to the plaintiff, they are also liable to each member of the proposed class for statutory damages. In addition, each class member is entitled to the exact same declaratory and injunctive relief. Moreover, the named plaintiff is aware of its responsibilities as a class representative, and is willing to take all steps necessary to vindicate the interest of the class. Verdery Affidavit, ¶ 8.

The named plaintiff and class counsel satisfy the adequacy requirements of O.C.G.A. § 9-11-23(a)(4) in this case.

#### E. <u>Certification under Rule 23(b)</u>.

Having satisfied the prerequisites of Rule 23(a), the Court must determine whether this action may be certified under any one of the three prongs of Rule (23(b). As explained below, this case may be certified under each.

# Possibility of conflicting adjudications and standards of conduct and impairment of class members' rights.

O.C.G.A. § 9-11-23(b)(1) provides for certification of a class action if:

[t]he prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests...

Rule 23(b)(1) first requires a plaintiff "to establish that there is a realistic possibility that separate actions involving the same subject matter will be brought in the absence of a class action." 5 Moore's § 23.41[1]; In re Dennis Greenman Sec. Litigation, 829 F.2d 1539 (11th Cir. 1987). Here, the prerequisite has been met: after this action was filed, several others have followed alleging that Staples Faxes violate the TCPA. In addition, certification under Rule 23(b)(1) is only applicable to cases, such as the instant one, where declaratory or injunctive relief is sought. In re Dennis Greenman Sec. Litigation, supra.

After the preliminary hurdles are met, the first prong of the rule then focuses on possible prejudice to defendants that may attend multiple litigation, while the second focuses on possible harm to class members and "seeks to protect them against situations where they would be prejudiced by separate litigation." Moores, supra. This is one of the few cases where both such requirements of 9-11-23(b)(1) are met, owing to the nature of the statutory scheme underlying the claims of class members and the nature and scope of the fax advertisements at issue.

The TCPA is unique in that it is a federal statute granting a private right of action to all citizens, but vesting exclusive jurisdiction of said actions in the state courts where claimants reside.

47 U.S.C. 227(b)(3). The class in this case is nationwide, with members likely residing in every state

<sup>&</sup>lt;sup>6</sup> Affidavit of Counsel, ¶ 9(h).

in the United States.<sup>7</sup> Although class members' claims against the defendants arise from a single statute, individual state courts may have varying interpretations of the TCPA's provisions with respect to those claims.<sup>8</sup> Thus, despite the fact that there is a federal regulatory scheme in place, conflicting state court adjudications could expose Staples to varying and incompatible standards of conduct, making it difficult to ascertain its rights and obligations under the TCPA. In those states where courts make specific findings (in response to individual or class actions) that the Staples Faxes at issue in this case violate the TCPA, the defendants would be barred from such fax advertising without first obtaining express permission as required by the statute.<sup>9</sup> However, in states where the issue is not reached, the defendants would act at their own peril in the absence of court guidance. As a nationwide retailer utilizing direct fax marketing to its customer base, such a chaotic regulatory scheme would be cumbersome, at best, requiring significant expense and guesswork to comply with the law.

Likewise, without certification members of the class could be substantially, if not entirely, impaired or impeded in their abilities to protect their interests due to the possibility of conflicting

<sup>&</sup>lt;sup>7</sup> Through its retail, catalogue and online operations, Staples does business in every state in the United States. As of August 2, 2003, Staples operated 1,320 retail stores throughout North America. See public filings of Staples, Inc. with Securities and Exchange Commission.

<sup>&</sup>lt;sup>8</sup> The possibility of varying state court interpretations of the TCPA does not bar this case from proceeding as a class action, so long as the Court recognizes any variances in individual states and applies those interpretations to the claims of class members residing in such states. See <u>Phillips Petroleum Co. v. Shutts</u>, 472 U.S. 797, 105 S. Ct. 2965, 86 L.E.2d 628 (1985).

<sup>&</sup>lt;sup>9</sup> Class counsel are unaware of any state court having decided the very issue at the heart of this litigation—whether the TCPA bans fax advertisements sent by a company to its customers who provided their fax telephone numbers but not their express permission to receive fax ads.

state court interpretations of the TCPA.<sup>10</sup> In addition, the claims of class members could be unwittingly disposed of by one or more adverse judgments in other individual cases.<sup>11</sup>

Under the unique regulatory scheme and circumstances attending this case, certification to proceed as a class action pursuant to O.C.G.A. § 9-11-23(a)(1) is appropriate.

#### 2. <u>Class-wide declaratory and injunctive relief.</u>

O.C.G.A. § 9-11-23(b)(2) provides for class certification where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The fact that class members also seek damages does not preclude certification for declaratory and injunctive relief. Berger v. Xerox Corp. Retirement Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2003). As well-explained by the Seventh Circuit (Judge Posner presiding):

True, the declaration sought and obtained was merely a prelude to a request for damages...But a declaratory judgment is normally a prelude to a request for other relief, whether injunctive or monetary; so there is nothing suspicious about the characterization of the suit as one for declaratory relief. The hope that motivates casting a request for relief in declaratory terms is that if the declaration is granted, the parties will be able to negotiate the concrete relief necessary to make the plaintiffs whole without further judicial proceedings. No one wants an empty declaration. As long as the concrete follow-on relief that is envisaged will if ordered (that is, if

<sup>&</sup>lt;sup>10</sup> Plaintiff acknowledges that "the possibility that an action will have either precedential or stare decisis effect on later cases is not sufficient to satisfy Rule 23(b)(1)(B)." Larionoff v. United States, 175 U.S. App. D.C. 32, 533 F.2d 1167, 1181 n. 36 (D.C.Cir.1976), aff'd, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977). However, as noted above, conflicting state court interpretations of the TCPA as it relates to class members' claims would, as a practical matter, make it difficult to seek redress on a class-wide basis, thereby impairing the rights of all members, not just those who choose to bring individual claims.

The individual claims of residents in one state, e.g. Georgia, would be bound by precedential decisions of that state's courts. However, individual class members' claims in one state may also be substantially impaired by adverse decisions against class members in other states, which, while not binding, may be deemed persuasive and therefore be followed.

negotiations for relief consistent with the declaration break down) be the direct, anticipated consequence of the declaration, rather than something unrelated to it, the suit can be maintained under Rule 23(b)(2). Berger, 338 F.3d 763-764 (emphasis added).

The TCPA provides each member of the class the right to seek injunctive relief against the defendants to prevent future violations of the TCPA. Here, the defendants have acted uniformly by transmitting Staples Faxes to each member of the class and by refusing to comply with the TCPA which requires prior express permission before doing so. Class members are entitled to seek declaratory relief as to whether the defendants' conduct violates the TCPA. In addition, class member are entitled to final injunctive relief requiring that the defendants comply with the TCPA by, among other things, obtaining express permission from class members before sending future Staples Faxes. The fact that statutory damages would necessarily flow from declaratory relief does not prevent certification under Rule 23(b)(2). Berger, supra. Therefore, certification of this action for class-wide declaratory and prospective injunctive relief is appropriate.

# Common issues of law and fact predominate and a class action is a superior method of resolving the controversy.

O.C.G.A. § 9-11-23(b)(3) provides for class certification where "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and...a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In making such findings (particularly the latter one regarding superiority), the Court should inquire into the following matters:

- (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

- (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) The difficulties likely to be encountered in the management of a class action.

Here, there is little doubt that questions of law and fact common to members of the class predominate over questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions include: (a) whether the Fax and other Staples Faxes constitute unsolicited fax advertisements pursuant to the TCPA; (b) whether the defendants' transmissions of the Fax and Staples' Faxes to class members violated the TCPA and class members are entitled to a declaration of the same; (c) whether the defendants should be enjoined from future violations of the TCPA and should be required to obtain express permission from class members prior to sending future Staples Faxes to them; (d) whether the defendants are liable to class members in the amount of \$500 for each Staples Fax sent to them; and (e) whether the defendants willfully or knowingly violated the TCPA, and are therefore liable in the amount of \$1,500 for each Staples Fax sent to class members.

There are no individual questions of liability or damages. The class is comprised only of those persons and entities who received Staples Faxes who did not give prior express permission to receive the same. It is believed that the Staples Faxes were transmitted only to customers of Staples who provided Staples with their fax telephone numbers. The defendants' primary defense is that the plaintiff and class members gave their express permission to receive fax advertisements merely by being customers of Staples. Any recipient of the Fax or other Staples Faxes who gave their prior express permission to Staples as required by the TCPA is excluded from the class. Therefore, there will be no need to make individual determinations of whether class members' business relationship

or transactions with Staples constitutes sufficient <u>express permission</u> to avoid liability under the TCPA. Likewise, once liability is determined, declaratory and injunctive relief will apply with equal force class-wide and damages will be conclusively established by the statute. Thus, there will no individualized analysis or proof with respect to individual class members' remedies or damages.

A class action is clearly a far superior method of resolving this controversy, avoiding potentially thousands of individual actions. In addition, due to the relatively small size of statutory damages (\$500, which may be trebled to \$1,500), it would be difficult for individual class members to prosecute actions on their own. The limited recovery of individual cases would dissuade attorneys from handling such claims on a contingency fee basis, and it would be impractical and uneconomical to pay attorneys hourly to handle claims where damages recovered would be eclipsed by litigation expenses and fees. As recognized by the Supreme Court, the primary policy underlying the class action device is to allow individual plaintiffs with small claims and limited resources to proceed against the financial resources and abilities of large corporations such as Staples, who might otherwise escape liability for violations of the law. Amchem Products, Inc. v. Windsor, supra.

In addition, the class can easily be managed by the Court with the assistance of class counsel. The recourse sought for each class member is declaratory and injunctive relief and statutory damages. Staples has extensive information on each class member, including mailing addresses, telephone and fax numbers, and email addresses. Thus, as and when necessary class members can be given the "best notice practicable under the circumstances" concerning pendency of the case and the right to opt-out. O.C.G.A. ¶ 9-11-23(c)(2); Phillips Petroleum Co. v. Shutts, 472 U.S. 797

(1985).<sup>12</sup>

As this Court, other Georgia trial courts and the Georgia Court of Appeals have recognized, junk fax cases brought under the TCPA may be maintained as class actions. See Nicholson v. Hooters of Augusta, Inc., Richmond County Superior Court, Case No. 95-RCCV-606; Hooters, supra. (Ga. App. 2000). In addition, the overwhelming majority of state courts have certified cases brought as class actions under the TCPA. In all, more than 30 TCPA class actions have been certified in cases filed in Georgia, Arizona, California, Florida, Illinois, Indiana, Iowa, Maryland, New Jersey, Ohio, Pennsylvania, South Carolina, Texas. 14

This case is well qualified for class treatment under Rule 23(b)(3).

#### III. <u>CONCLUSION</u>.

Wherefore, for the foregoing reasons, plaintiff requests that the Court enter an order certifying this action as a class action and allowing the case to proceed as such.

<sup>&</sup>lt;sup>12</sup> Unlike certification for damages, certification for purposes of declaratory and injunctive relief does not require notice of pendency and opt-out rights. O.C.G.A. § 9-11-23(c)(2).

Other Georgia cases certifying TCPA class actions include Malka & Trainor, P.C. v. Capitol Special Risks, Inc., Fulton County Superior Court, Civil Action No. 2001-CV-37309, and Holzer v. Homestead Bank, Fulton County Superior Court, Civil Action No. 2002-CV-55833.

<sup>&</sup>lt;sup>14</sup> See e.g., ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844 (Az. Ct. App. 2002) (reversing and remanding trial court's denial of class certification); Kaufman v. ACS Systems, Inc., 2 Cal. Rptr. 3d. 296 (Cal. Ct. App. 2003); Penzer v. MSI Marketing, Inc. d/b/a Y2Marketing, No. 01-30868CA32 (Fla. Cir. Apr. 2, 2003); Gold Seal Termite & Pest Control Co. v. PrimeTV. LLC, Marion County Circuit Court, Case No. 40C01-0112-CP-3010 (Indiana); Kenro, Inc. v. APO Health, Inc., No. 49D12-0101-CP-000016 (Ind. Super. Nov. 5, 2001); Levitt v. Fax.com, Inc., No. 24-C-01-002218 (Md. Cir. Dec. 24, 2002); Lipscomb v. Wal-Mart Stores, Inc., No. 01-CP-20-263 (S.C. Common Pleas (Fairfield), June 12, 2003); Syrett v. Allstate Ins. Co., No. 02-CP-32-0751 (S.C. Common Please (Fairfield), Aug. 12, 2003).

### Respectfully submitted this <u>131</u> day of November, 2003.

KEVIN S. LITTLE, P.C.

Kevin S. Little

Georgia Bar No. 454225

431 Walker Street

Augusta, Georgia 30901

(706) 722-7886

BROWNSTEIN & NGUYEN, L.L.C.

Jay D. Brownstein

Georgia Bar No. 002590

2010 Montreal Road

Tucker, Georgia 30084

(770/458-9060)

Counsel for Plaintiff

#### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION upon opposing counsel by depositing the same in the United States mail with proper postage affixed thereto and addressed as follows:

Robert B. Hocutt, Esq. Mark D. Lefkow, Esq. Nall & Miller, LLP Suite 1500, North Tower 235 Peachtree Street, N.E. Atlanta, Georgia 30303-1401

This <u>13th</u> day of November, 2003.

Kevin S. Little

Georgia Bar No. 454225

### EXHIBIT 4

SUPERIOR COURT	OF	RICHMOND (	COUNTY
STATE	OF	GEORGIA	

	STATE OF GEORGIA	53 MAN 10 PM 4: 25	
MATTISON R. VERDERY, C.P.A, Findividually and on behalf of all person entities similarly situated,	-	Archand Court Ga.	
Plaintiffs,	,	ction File No. CCV-728	
v. STAPLES, INC. and QUICK LINK INFORMATION SERVICES, LLC,	) ) JURY T ) )	RIAL DEMANDED	
Defendants.	)		

# AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

#### INTRODUCTION

- 1. The named plaintiff herein, Mattison R. Verdery, C.P.A., P.C. ("Plaintiff"), by counsel, brings this action individually and on behalf of a class of all persons and entities similarly situated (the "Plaintiff Class," and with Plaintiff sometimes collectively referred to as "Plaintiffs") for monetary and injunctive relief against the defendants for their knowing and willful violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1) ("TCPA"), and its implementing regulations, 47 C.F.R. § 64.1200(a)(3). This federal scheme prohibits, and creates a private right of action for monetary and injunctive relief to redress, the sending of unsolicited advertisements to a person or business by facsimile ("fax"). To carry out its purpose, the TCPA explicitly vests state courts with exclusive subject matter jurisdiction over the causes of action it creates.
- 2. During March 2003, the defendants sent an unsolicited fax advertisement to the Plaintiff and to members of the Plaintiff Class. The defendants did not have prior express

permission or invitation to send the unsolicited fax advertisement to the Plaintiffs, and each and every such fax advertisement violated the TCPA.

#### **PARTIES: JURISDICTION**

- 3. The Plaintiff is a Georgia professional corporation having its principal place of business in Richmond County, Georgia.
- 4. Upon information and belief, defendant Staples, Inc. ("Staples") is a Delaware corporation and has its principal place of business located at 500 Staples Drive, Framingham, Massachusetts 01702. Staples is registered to transact business, and does transact business in the State of Georgia by and through, among other things, its retail operations located throughout the State, including in Richmond County, and the website "Staples.com" by which it markets and solicits sales of, and does sell, office products to residents of this State via the Internet. Staples maintains a registered office in Georgia at 180 Cherokee Street, N.E., Marietta, Georgia 30060, and may be served with process pursuant to O.C.G.A. § 14-2-1510 by service upon its registered agent, Corporation Process Co., at said address. Staples owns and operates the website "Staples.com."
- 5. Upon information and belief, defendant Quick Link Information Services, LLC ("Quick Link," and together with Staples, the "Defendants") is a Connecticut limited liability company with its principal place of business located at 131 Commercial Parkway, Branford, Connecticut 06405.
- 6. This Court has subject matter jurisdiction over this action, and venue is proper pursuant to O.C.G.A. § 9-10-93.
- 7. This Court has personal jurisdiction over the defendant Quick Link pursuant to O.C.G.A. §§ 9-10-90 et seq., the Georgia Long Arm Statute. Quick Link is a corporation not

organized or existing under the laws of Georgia and is not authorized to do or transact business in this State, and therefore constitutes a "nonresident" pursuant to the Georgia Long Arm Statute. The allegations herein relate to Quick Link's tortious conduct originating outside the State of Georgia and causing injury within the State, to wit trespass and damage to personal property of the Plaintiff and other members of the Plaintiff Class residing in this State. In addition, through a persistent course of conduct, to wit the repeated transmittal of unsolicited fax advertisements into the State of Georgia, Quick Link has transacted business in, and is therefore subject to personal jurisdiction in, this State.

#### THE TCPA

8. The Plaintiffs bring this suit under the TCPA, 42 U.S.C. § 227(b)(1)(C), which provides that "[i]t shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." The TCPA, 42 U.S.C. § 227(b)(3), further provides a private right of action exclusively in state court, as follows:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State, (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or (C) both such actions.

Moreover, the TCPA also provides for treble damages. "If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal

to not more than 3 times the amount available under subparagraph (B) of this paragraph." Id.

- 9. The federal regulations implementing the TCPA similarly provide that no person may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 C.F.R. § 64.1200(a)(3).
- 10. By sending unsolicited fax advertisements to the Plaintiff and each member of the Plaintiff Class, the Defendants willfully or knowingly violated the TCPA and its implementing regulations. Accordingly, the Defendants are liable jointly and severally, for at least \$500, and up to \$1,500, for each of their unsolicited fax advertisements to the Plaintiffs.

#### FACTUAL BACKGROUND

- 11. The Plaintiff is a professional corporation providing accounting services to the general public from its business location at 3540 Wheeler Road, Suite 207, Augusta, Georgia 30909. The Plaintiff's sole shareholder and principal, Mattison R. Verdery, is a certified public accountant.
- 12. In communicating with and providing accounting services to its clients, the Plaintiff employs and relies upon telecommunications devices including a telephone and fax machine.
- 13. From approximately 1993 to present, the Plaintiff has maintained the following telephone number for use by a fax machine: 706-733-1863. From this telephone number, Plaintiff both sends and receives faxes to and from clients and third parties.
- 14. Defendant Quick Link is a fax service bureau providing direct fax advertising and other marketing services to its clients. On its website, "www.quick-link.com," Quick Link describes its broadcast fax service as follows:

Quick Link's broadcast fax service can deliver your message to all of your

customers, members, organizations, and subscribers to unlimited fax equipped locations worldwide. We provide your recipients with the time sensitive information they need instantly. Quick Link can combine text, graphics, and even merge any information contained in your database on the fax, providing a powerful personalized message. See excerpt from Quick Link's website, attached as Exhibit "A" to the original Complaint filed in this action (hereafter, the "Complaint").

- 15. Defendant Staples owns and operates the website "Staples.com," through which it markets and sells office products to the general public.
- 16. On or about March 18, 2003, the Plaintiff received an unsolicited fax
  advertisement (the "Fax") sent by defendant Quick Link on behalf of defendant Staples. A true
  copy of the Fax is attached as Exhibit "B" to the Complaint.
- 17. Defendant Quick Link, on behalf of defendant Staples, transmitted the Fax to members of the Plaintiff Class numbering approximately 160,000 to 180,000. Defendant Staples provided Quick Link with a computer database containing the names and facsimile telephone numbers of members of the Plaintiff Class, all of whom are believed to be customers of Staples who provided Staples with fax telephone numbers.
- 18. The Fax constitutes a 2 page advertisement for office products sold by defendant Staples. On the bottom of both pages, the Fax invites recipients to "CALL 1-800-333-3330," which is Staples' main customer order telephone number for Staples. Also on the bottom of each page, the fax invites recipients to "CLICK www.staples.com," a website owned and operated by Staples where customers can search and purchase products sold by Staples.
  - 19. On the bottom of page 1, the Fax instructs recipients "[i]f you wish to be removed

from our fax list, please write "remove" on this document and fax it back toll free to 1-800-543-5055." Based upon information obtained through an investigation by Plaintiffs' counsel, the "removal" telephone number on the Fax belongs to defendant Quick Link.

20. Plaintiffs are informed that the Defendants transmitted additional unsolicited facsimile advertisements to members of the Plaintiff Class both before and after the transmission of the Fax.

#### **CLASS ALLEGATIONS**

- 21. The Plaintiff brings this class action pursuant to O.C.G.A. § 9-11-23 on behalf of the following two subclasses of individuals and entities comprising the Plaintiff Class:
  - (a) all individuals and entities residing in the United States who, during the period July 23, 1999 through the present and continuing ("Class Period"), received one or more facsimiles sent by either of the Defendants advertising the commercial availability of office products sold by Staples ("Staples Faxes") who not give their prior express permission or invitation to receive such faxes; and
  - (b) all individuals and entities residing in the State of Georgia who, during the Class Period, received one or more Staples Faxes who not give their prior express permission or invitation to receive such faxes.

The Defendants, any entity in which a Defendant has a controlling interest, any officer, director, principal, employee or agent of a Defendant, and the legal representatives, heirs, successors or assigns of all such parties are excluded from the Plaintiff Class.

- 22. There are believed to be between 160,000 and 180,000 persons and entities who are members of the Plaintiff Class. Thus, the members of the Plaintiff Class are so numerous as to make it impracticable to bring all of them individually before the Court. O.C.G.A. § 9-11-23(a)(1).
- 23. There are common questions of law and fact involved in this action, and common relief is sought by members of the Plaintiff Class. O.C.G.A. § 9-11-23(a)(2). The issues which

are common among claims of the members of the Plaintiff Class predominate over any individual issues. Among the questions of law and fact common to the Plaintiff Class are:

- (a) whether the Staples Faxes constitute unsolicited fax advertisements pursuant to the TCPA;
- (b) whether the Defendants violated the TCPA by sending Staples Faxes to the Plaintiffs;
- (c) whether the Defendants are liable to the Plaintiffs in the amount of \$500 for each Staples Fax sent by the Defendants;
- (d) whether the Defendants willfully or knowingly violated the TCPA by sending Staples Faxes to members of the Plaintiff Class, and are therefore liable to the Plaintiffs in the amount of \$1,500 for each Staples Fax sent;
- (e) whether the Defendants should be enjoined from future violations of the TCPA; and
- (f) whether the Defendants have acted in bad faith, been stubbornly litigious or have caused unnecessary expense and trouble to the Plaintiffs, and are therefore liable for their attorneys' fees and expenses of litigation.
- 24. The claims of the named Plaintiff are typical of the claims of the members of the Plaintiff Class. O.C.G.A. § 9-11-23(a)(3).
- 25. The named Plaintiff is an adequate representative of the Plaintiff Class, and would fairly serve and protect the interests of the Plaintiff Class in this action. O.C.G.A. § 9-11-23(a)(4).
- 26. The Plaintiff and members of the Plaintiff Class are entitled to declaratory relief as to whether the Defendants' transmissions of Staples Faxes constitute violations of the TCPA.

If the Defendants' conduct is found to violate the TCPA, class members are entitled to final injunctive relief to prevent the Defendants from future transmissions of Staples Faxes in violation of the TCPA. Thus, this action may be certified as a class action pursuant to O.C.G.A. § 9-11-23(b)(2).

27. Questions of law and fact common to members of the Plaintiff Class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Thus, this action may be certified as a class action pursuant to O.C.G.A. § 9-11-23(b)(3).

#### COUNT I DECLARATORY RELIEF

- 28. The Plaintiffs hereby incorporate all of the allegations of paragraphs 1-27 as set forth herein.
- 29. Each individual transmission by the Defendants of the Staples Faxes, including the Fax, constitutes an "unsolicited advertisement" as defined by TCPA, 47 U.S.C. § 227(a)(4): "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." The Staples Faxes advertise the commercial availability of office products sold by the defendant Staples.
- 30. Neither the Plaintiff nor the members of the Plaintiff Class expressly invited or gave the Defendants prior express permission to send any of the Staples Faxes or the advertisements contained therein.
- 31. Pursuant to O.C.G.A. § 9-4-1 et seq., the Plaintiffs are entitled to a declaration that by transmitting the Staples Faxes, including the Fax, to members of the Plaintiff Class without receiving their prior express permission before doing so, the Defendants have violated

the TCPA's prohibition against unsolicited fax advertisements.

# COUNT II INJUNCTIVE RELIEF

- 32. The Plaintiffs hereby incorporate all of the allegations of paragraphs 1-31 as set forth herein.
- 33. The TCPA provides for injunctive relief to enjoin violations of its provisions. 47 U.S.C. §§ 227(b)(3)(A), (C).
- 34. By their conduct alleged herein, the Defendants have willfully and knowingly violated the provisions of the TCPA by sending Staples Faxes to the Plaintiff and members of the Plaintiff Class, who neither invited nor gave their prior express permission to receive, such fax advertisements.
- 35. Accordingly, the Defendants should be temporarily and permanently enjoined from sending future Staples Faxes to the Plaintiff and members of the Plaintiff Class without first obtaining their express permission as explicitly required by the TCPA.

## COUNT III STATUTORY DAMAGES

- 36. The Plaintiffs hereby incorporate all of the allegations of paragraphs 1-35 as set forth herein.
- 37. By their conduct alleged herein, the Defendants have violated the TCPA's prohibition of the transmission of unsolicited fax advertisements. 47 U.S.C. § 227(b)(1)(C).
- 38. Accordingly, the Defendants are liable to the Plaintiffs, jointly and severally, in the statutory amount of \$500 for each individual transmission of Staples Faxes, including the Fax, to the Plaintiff and members of the Plaintiff Class. 47 U.S.C. § 227(b)(3)(B).

### COUNT IV STATUTORY TREBLE DAMAGES

- 39. The Plaintiffs hereby incorporate all of the allegations of paragraphs 1-38 as set forth herein.
- 40. Pursuant to the TCPA, if either of the Defendants "willfully or knowingly" sent unsolicited fax advertisements, the Court may increase the statutory penalty up to the amount of \$1,500 per unsolicited fax advertisement sent. 47 U.S.C. § 227(b)(3)(C).
- 41. Defendant Quick Link is, by its own description, a fax service bureau whose primary business includes the "broadcasting," or transmitting repeatedly to multiple locations, by fax machine, computer or other device, faxes of a commercial nature on behalf of its advertising clients.
- 42. Either or both of the Defendants knew, or with reasonable diligence should have known, that the Plaintiffs did not expressly invite the Staples Faxes, including the Fax, and did not give the Defendants prior express permission to transmit fax advertisements to them, and therefore knew or should have known that the Staples Faxes were unsolicited fax advertisements within the meaning of the TCPA.
- 43. The repeated transmissions of Staples Faxes, including the Fax, to the Plaintiff and individual members of the Plaintiff Class were intentional and not accidental, and therefore willful.
- 44. Accordingly, the Defendants are liable to the Plaintiffs, jointly and severally, in the statutory treble damage amount of \$1,500 for each individual Staples Fax, including the Fax, transmitted to the Plaintiff and members of the Plaintiff Class. 47 U.S.C. § 227(b)(3)(C).

### COUNT V ATTORNEYS' FEES

- 45. The Plaintiffs hereby incorporate all of the allegations of paragraphs 1-44 as set forth herein.
- 46. By their actions alleged herein, the Defendants have acted in bad faith, been stubbornly litigious and have caused unnecessary expense and trouble to the Plaintiff and members of the Plaintiff Class.
- 47. As a result of the Defendants' aforesaid conduct, the Plaintiffs are entitled to recover from Defendants the expenses of litigation in this action, including court and litigation costs and attorneys' fees pursuant to O.C.G.A. § 13-6-11.

#### JURY DEMAND

The Plaintiffs hereby demand a trial by jury of this matter.

#### PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs demand a trial by jury, judgment, and such other and further relief as law and equity may require against the Defendants and each of them, jointly and severally, as follows:

- (a) declaring that the Defendants' transmissions of Staples Faxes, including the Fax, to the Plaintiffs constitute violations of the TCPA;
- (b) temporarily and permanently enjoining the Defendants from transmitting unsolicited fax advertisements to the Plaintiffs without first obtaining their express permission as required by the TCPA;
- (c) awarding the Plaintiff and each member of the Plaintiff Class statutory damages against the Defendants, jointly and severally, in the amount of \$500 for each transmission of Staples Faxes, including the Fax, to the Plaintiffs;

- (d) awarding the Plaintiff and each member of the Plaintiff Class statutory treble damages against the Defendants, jointly and severally, in the amount of \$1,500 for each transmission of the Staples Faxes, including the Fax, to the Plaintiffs;
- (e) awarding the Plaintiffs their costs of litigation and reasonable attorneys' fees pursuant to O.C.G.A. § 13-6-11;
- (f) awarding the Plaintiffs all costs of this action; and
- (g) granting such other and further relief as the Court may deem just and proper.

Submitted this 13 day of November, 2003.

KEVIN S. LITTLE, P.C.

Kevin S. Little

Georgia Bar No. 454225

431 Walker Street

Augusta, Georgia 30901

(706) 722-7886

BROWNSTEIN & NGUYEN, L.L.C.

May D. Brownstein

Georgia Bar No. 002590

2010 Montreal Road

Tucker, Georgia 30084

(770/458-9060)

Counsel for Plaintiffs

#### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES upon opposing counsel by depositing the same in the United States mail with proper postage affixed thereto and addressed as follows:

Robert B. Hocutt, Esq. Mark D. Lefkow, Esq. Nall & Miller, LLP Suite 1500, North Tower 235 Peachtree Street, N.E. Atlanta, Georgia 30303-1401

This  $13^{1/2}$  day of November, 2003.

Kevin S. Little

Georgia Bar No. 454225

#### STATE OF GEORGIA

#### COUNTY OF RICHMOND

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, Mattison R. Verdery, President of Mattison R. Verdery, C.P.A., P.C., who after first being duly sworn, states that the facts contained in the within and foregoing Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages are true and correct except as to the statements made on information and belief, which statements he believes to be true and correct.

MATTISON R. VERDERY, C.P.A., P.C.

By: Mattison R. Verdery

President

Sworn to and subscribed before me

this 13H day of November

.2003 ر

Notary Public

Commission Expires:

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